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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA-EASTERN DIVISION  
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15 SALUSTIANO RAMIREZ, ) CV 12-01279 (SH)  
16 )  
17 Plaintiff, ) MEMORANDUM DECISION  
18 ) AND ORDER  
19 v. )  
20 CAROLYN W. COLVIN, Acting )  
Commissioner of Social Security, )  
21 Defendant. )  
22

23 I. PROCEEDINGS

24 This matter is before the Court for review of the Decision of the Commissioner of  
25 Social Security denying plaintiff's application for Social Security Disability Insurance  
26 Benefits. Pursuant to 28 U.S.C. § 636(c), the parties have consented that the case may be  
27 handled by the undersigned. The action arises under 42 U.S.C. § 405(g), which authorizes  
28 the Court to enter judgment upon the pleadings and transcript of the record before the  
Commissioner. Plaintiff and Defendant have filed their pleadings and memorandums of

1 points of authorities. The defendant has filed the certified administrative record (AR).  
2 The matter has been taken under submission.  
3

## 4 II. BACKGROUND

5 On November 12, 2008, Plaintiff filed an application for Disability Insurance Benefits  
6 (DIB) alleging disability since November 5, 2008. (AR 20, 292-93). He later amended his  
7 onset date to June 6, 2006 (AR 171-72). Plaintiff's application was denied on February 4,  
8 2009 and denied upon reconsideration on April 30, 2009. (AR 20). Plaintiff requested an  
9 administrative hearing which was held before an Administrative Law Judge (ALJ). Three  
10 hearings took place on May 26, 2010, February 8, 2011, and February 25, 2011. (AR 42-  
11 166).  
12

13 Following the hearings, the ALJ concluded that Plaintiff was not and had not been  
14 under a disability within the meaning of the Social Security Act during the period alleged  
15 through the date of the decision. (AR 20). The ALJ determined that Plaintiff suffered  
16 from morbid obesity, degenerative disc disease of the neck and lumbar spine, bilateral  
17 carpal tunnel syndrome, and right peroneal nerve neuropathy. (AR 22). However, the  
18 ALJ found that Plaintiff did not have an impairment or combination of impairments that  
19 meet or medically equal one of the listed impairments. (AR 23). Furthermore, the ALJ  
20 found that: (1) Plaintiff has a residual functional capacity to perform light work; (2)  
21 Plaintiff is unable to perform past relevant work; and (3) that considering Plaintiff's age,  
22 education, work experience, and residual functional capacity, there are jobs that exist in  
23 significant numbers in the national economy that Plaintiff can perform. (AR 24, 34).  
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25 The Appeals Council denied review of the decision on July 16, 2012. (AR 1-6). This  
26 action followed.  
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## III. CONTENTIONS OF THE PARTIES

1 Plaintiff filed this action making six challenges to the ALJ's decision. Plaintiff  
2 contends that: (1) the ALJ committed legal error in not adequately assessing Plaintiff's  
3 testimony; (2) the ALJ failed to properly reject the opinions of the treating physician; (3)  
4 the ALJ failed to consider radiculopathy of the cervical spine; (4) the ALJ failed to  
5 properly consider Plaintiff's hand limitations; (5) the record supports a meeting or  
6 equaling of listing 1.04A; and (6) the ALJ's Residual Functional Capacity (RFC) is not  
7 supported by substantial evidence.  
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9 Defendant asserts that the ALJ reasonably discredited Plaintiff's testimony due to  
10 inconsistencies the ALJ found in Plaintiff's testimony and daily activities. Additionally,  
11 Defendant contends that the ALJ properly rejected the treating physician's opinion  
12 because it was unsupported by his treatment notes and inconsistent with the opinions of  
13 other doctors. Also, the Defendant argues that the ALJ properly considered Plaintiff's  
14 allegations of radiculopathy and hand limitations in determining the requirements for  
15 Listing 1.04A and Plaintiff's residual functional capacity.

16 For the reasons discussed below, the Court finds that the Plaintiff's first and second  
17 claims of error have merit. Since the matter is remanded for further proceedings based on  
18 Plaintiff's first two claims of error, the Court will not address Plaintiff's third, fourth,  
19 fifth, and sixth claims.  
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#### 21 IV. DISCUSSION

##### 22 A. **Standard of Review**

23 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's decision to  
24 determine if: (1) the Commissioner's findings are supported by substantial evidence; and  
25 (2) the Commissioner used proper legal standards. DeLorme v. Sullivan, 924 F.2d 841,  
26 846 (9<sup>th</sup> Cir. 1991). Substantial evidence means "more than a mere scintilla," Richardson  
27 v. Perales, 402 U.S. 389,401 (1971), but "less than a preponderance." Desrosiers v. Sec'y  
28 of Health and Human Servs., 846 F.2d 573,576 (9<sup>th</sup> Cir. 1988). This Court cannot disturb  
the Commissioner's findings if those findings are supported by substantial evidence, even

1 though other evidence may exist which supports Plaintiff's claim. See Torske v.  
2 Richardson, 484 F.2d 59, 60 (9<sup>th</sup> Cir. 1973); Cert. denied, Torske v. Weinberger, 417 U.S.  
3 933 (1974); Harvey v. Richardson, 451 F.2d 589, 590 (9<sup>th</sup> Cir. 1971).

4 It is the duty of this court to review the record as a whole and to consider adverse  
5 as well as supporting evidence. Green v. Heckler, 803 F.2d 528, 529-30 (9<sup>th</sup> Cir. 1986).  
6 The court is required to uphold the decision of the ALJ where evidence is susceptible to  
7 more than one rational interpretation. Gallant v. Heckler, 753 F.2d 1450, 1453 (9<sup>th</sup> Cir.  
8 1984). The court has the authority to affirm, modify, or reverse the ALJ's decision "with  
9 or without remanding the cause for rehearing." 42 U.S.C. § 405(g). Remand is  
10 appropriate where additional proceedings would remedy defects in the ALJ's decision.  
11 McAllister v. Sullivan, 888 F.2d 599, 603 (9<sup>th</sup> Cir. 1989).

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14 **B. ISSUE NO. 1: The ALJ Committed Legal Error in Not Adequately**  
15 **Assessing Plaintiff's Testimony**

16 Plaintiff contends that the Plaintiff provided testimony consistent with the inability  
17 to work and that the ALJ discounted Plaintiff's testimony for reasons that were not  
18 legally sufficient. In response, Defendant contends that the ALJ articulated valid reasons  
19 for finding Plaintiff not credible.

20 Whenever an ALJ's evaluation of a claimant's testimony is a critical factor in a  
21 decision to deny benefits, the ALJ must make explicit credibility findings. Rahsad v.  
22 Sullivan, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir. 1990). Absent a finding of malingering, the ALJ  
23 must either accept Plaintiff's testimony as credible, or offer specific, "clear and  
24 convincing" reasons for rejecting subjective complaints regarding the severity of  
25 plaintiff's symptoms. Valentine v. Comm'r, 574 F.3d, 685, 693 (9<sup>th</sup> Cir. 1996). To  
26 determine whether the plaintiff's testimony regarding the severity of his symptoms is  
27 credible, the ALJ may consider: (1) ordinary techniques of credibility evaluation, such as  
28 the claimant's reputation for lying, prior inconsistent statements concerning symptoms,

1 and other testimony by the claimant that appears less candid; (2) unexplained or  
2 inadequately explained failure to seek treatment or to follow a prescribed course of  
3 treatment; and (3) the claimant's daily activities. Smolen v. Charter, 80 F.3d 1273, 1284  
4 (9<sup>th</sup> Cir. 1996). The ALJ may also consider the nature of Plaintiff's daily activities. Id.  
5 The claimant's daily activities, if rigorous enough to be a fair proxy for the demands of  
6 work, can constitute a basis to find allegations of disability pain (or other subjective  
7 symptoms) not credible. See Fair v. Bowen, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989); but see  
8 Vertigan v. Halter, 260 F.3d 1044, 1049-50 (9<sup>th</sup> Cir. 2001) (holding that "the mere fact  
9 that a plaintiff has carried on certain daily activities such as grocery shopping, driving a  
10 car, or limited walking for exercise, does not in any way detract from her credibility as to  
11 her overall disability").

12  
13 Here, there is no assertion or evidence of malingering. The ALJ failed to provide  
14 "clear and convincing" reasons for rejecting Plaintiff's subjective complaints regarding  
15 the severity of his symptoms. Moreover, the ALJ has mischaracterized Plaintiff's  
16 testimony to create inconsistencies and has considered insubstantial daily activities as  
17 inconsistent with Plaintiff's allegation of disabling pain and other symptoms.

18 The ALJ states that Plaintiff's testimony was rejected because of several  
19 inconsistencies in Plaintiff's testimony. (AR 27). The ALJ found there to be inconsistent  
20 testimony with regard to Plaintiff's urine incontinence, driving activity, and computer  
21 usage. (AR 25-26). However, there is no inconsistency because Plaintiff's testimony was  
22 taken out of context by the ALJ. This constitutes error. Regenitter v. Comm'r of Soc. Sec.  
23 Admin., 166 F.3d 1294, 1297 (9<sup>th</sup> Cir. 1999) (It is improper to mischaracterize the  
24 evidence).

25  
26 First, the ALJ asserts that Plaintiff's testimony about urine incontinence is  
27 inconsistent because Plaintiff had random leaks, but then reported urgency as well. (AR  
28 25). However, Plaintiff's testimony is not inconsistent because he testified that he had

1 two different problems. (AR 124-126). There are times that he leaks, and there are times  
2 that he has urgency. (AR 124-126). This is not inconsistent.

3 Second, the ALJ asserts that there is inconsistent testimony about Plaintiff's  
4 driving activity. The ALJ claims that despite evidence of Plaintiff driving to doctors'  
5 appointments, the Plaintiff testified that he does not drive. The ALJ took Plaintiff's  
6 testimony out of context. Plaintiff said, "I don't drive, if I have to go anywhere *I will not*  
7 *drive with my medication* because it makes me drowsy." (AR 85) (emphasis added).  
8 When taken into context, it is apparent that Plaintiff was not reporting that he never  
9 drives. Rather, the plaintiff was reporting that he does not drive when feeling the impact  
10 of his medications. Again, there is no inconsistency.

11 Third, the ALJ asserts an inconsistency in computer use. The ALJ claims that  
12 Plaintiff testified he did not use a computer, yet was able to input information when he  
13 listed a piece of property for sale. (AR 25). However, Plaintiff did not say that he does  
14 not use a computer. Plaintiff testified that he has problems using his hands to type due to  
15 random spasms, and that this would make holding a job requiring long hours of computer  
16 use difficult. (AR 144,146-147). These statements are not inconsistent. It is possible to  
17 occasionally use a computer and yet be unable to maintain a job that requires computer  
18 use for eight hours a day.

19 Lastly, the ALJ improperly rejected Plaintiff's credibility when he referenced  
20 reports of Plaintiff's daily activities. The ALJ noted that Plaintiff reported to a medical  
21 examiner that he drove a car, dressed, bathed, performed personal hygiene, read as a  
22 hobby, paid bills, and handled cash on a daily basis. (AR 26). However, it is improper to  
23 rely on such evidence to discredit Plaintiff's testimony when those activities do not  
24 consume a substantial part of Plaintiff's day. Vertigan, 260 F.3d at 1049-50. There was  
25 no evidence or testimony regarding how long Plaintiff could engage in these activities.  
26 As reasoned in Vertigan, activities that Plaintiff testified as being able to do, does not  
27 support the contention that he could engage in work or similar activity for a longer period  
28

1 when considering the pain involved. *Id.* at 1050. In stating that Plaintiff's activities  
2 "demonstrated Plaintiff was more functional than he claimed," the ALJ discredited  
3 Plaintiff's credibility without providing the bases for such conclusions. Plaintiff's  
4 testimony about feeling pain and numbness throughout the day does not wholly  
5 contradict his ability to do menial, daily chores around the house or occasionally drive to  
6 his doctors' appointments. The fact that Plaintiff can engage in these activities and yet  
7 still experience those symptoms does not suggest that Plaintiff is not credible. Therefore,  
8 the ALJ committed legal error by failing to provide clear and convincing evidence for  
9 rejecting Plaintiff's subjective complaints.  
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12 **C. ISSUE NO. 2: The ALJ Failed to Properly Reject the Opinions of the**  
13 **Treating Physician**

14 Plaintiff asserts the ALJ failed to properly discount the opinion of the treating  
15 physician, Dr. Pospisil, because the ALJ provided several unsupported or legally  
16 insufficient reasons for rejecting his opinion. Defendant argues the ALJ properly afforded  
17 Dr. Pospisil's opinion little evidentiary weight because Dr. Pospisil's opinion was not  
18 supported by his treatment notes, and was based primarily on Plaintiff's subjective  
19 complaints, which the ALJ deemed not credible. (AR 33).  
20

21 The opinions of treating physicians are entitled to special weight. Magallanes v.  
22 Bowen, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). Where the treating doctor's opinion is not  
23 contradicted by another doctor, it may be rejected only for "clear and convincing"  
24 reasons. Lester v. Chater, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Even if the treating  
25 physician's opinion is contradicted by another doctor, the ALJ may not reject this opinion  
26 without providing specific, legitimate reasons supported by substantial evidence in the  
27 record. *Id.* at 830-31. The ALJ can meet this burden by "setting out a detailed summary  
28 of the facts and conflicting clinical evidence, stating his interpretation thereof, and  
making findings." Embry v. Bowen, 849 F.2d 418, 421 (9<sup>th</sup> Cir. 1988).



1 The physician in question is Rick F. Pospisil, M.D., a Board Certified Orthopedic  
2 Surgeon. (AR 762). He was Plaintiff's primary treating physician through his workers  
3 compensation case. Dr. Pospisil diagnosed Plaintiff with cervical sprain/strain, thoracic  
4 sprain/strain with disc protrusion at L4-L5 and L5-S1, and bilateral carpal tunnel. (AR  
5 758, 763). In his disability statement, Dr. Pospisil indicated that Plaintiff could not  
6 lift/carry more than 20 pounds occasionally (AR 779), could only sit three to four hours  
7 out of eight hours, could only stand/walk one to two hours out of eight hours, could only  
8 use his hands for simple grasping and fine manipulation (AR 780), and would miss more  
9 than three days of work a month (AR 782).

11 The ALJ rejected Dr. Pospisil's opinion that Plaintiff was unable to work a 40-hour  
12 work week, because Dr. Pospisil's disability statement was based on Plaintiff's  
13 statements, rather than objective medical findings. (AR 33). The ALJ also found that the  
14 doctor's severe work restrictions were not supported by the Plaintiff's treatment records.  
15 (AR 33).

16 The ALJ's finding that Dr. Pospisil's opinion was based on Plaintiff's statements  
17 rather than objective evidence is not a valid reason for rejecting the doctor's opinion.  
18 Contrary to the ALJ's statement, Dr. Pospisil's opinion was based on twelve medical  
19 visits with Plaintiff. (AR 701-37,753-72, 821-24). During these visits Dr. Pospisil  
20 examined the Plaintiff and performed tests on him. For example, Dr. Pospisil made an  
21 "examination of the cervical spine," tested Plaintiff's "deep tendon reflexes," and had  
22 Plaintiff undergo an "MRI of the neck" and "repeat nerve testing." (AR 662, 619, 631).  
23 Thus, Dr. Pospisil's opinion was based on observation and testing of Plaintiff and was  
24 not mere "patient accommodation" as the ALJ asserts. (AR 33).

26 Moreover, the ALJ makes several unsupported assertions regarding medical  
27 evidence from Dr. Pospisil. The ALJ alleged that the first report from Dr. Pospisil was  
28 not provided. (AR 30). This statement is incorrect. The initial report of Dr. Pospisil is in  
the administrative record. (AR 657-667). The ALJ also asserts that there was no treatment



1 by Dr. Pospisil from January 8, 2008 through April 28, 2009. (AR 30). This statement is  
2 also incorrect. The record shows that there were treatments on February 12, 2008 (AR  
3 618-621), March 25, 2008 (AR 610-613), May 6, 2008 (AR 606-609), June 3, 2008 (AR  
4 601-605), November 25, 2008 (AR 597-600), December 23, 2008 (AR 593-596), January  
5 20, 2009 (AR 589-592), March 3, 2009 (AR 588), and March 31, 2009 (AR 584-587).  
6 Therefore, the ALJ failed to consider evidence supporting the treating physician's  
7 opinion.  
8


9 The ALJ's second reason for rejecting Dr. Pospisil's opinion is also improper. The  
10 ALJ asserts that the limitations Dr. Pospisil imposed in his disability statement are not  
11 supported by the doctor's treatment notes because the same limitations were not written  
12 under the work status for the Plaintiff. (AR 33). However, as noted above, the ALJ failed  
13 to consider a substantial amount of treatment records from Dr. Pospisil. Although Dr.  
14 Pospisil's work status reports do not exactly match the limitations he was required to  
15 identify on the disability form, this does not make the two records inconsistent with each  
16 other. In his treatment notes and work status updates, Dr. Pospisil provides evidence  
17 consistent with Plaintiff being unable to work a 40-hour work week. For example, some  
18 of the treatment notes from Dr. Pospisil report that Plaintiff is "temporarily totally  
19 disabled" (AR 591, 603, 611, 619, 702) or that Plaintiff "remains incapable of  
20 functioning workwise" (AR 624). Therefore, Dr. Pospisil's reports are not inconsistent  
21 with each other, and the ALJ's finding that Dr. Pospisil's work restrictions are not  
22 supported by the Plaintiff's treatment record is not valid.  
23

24 The ALJ failed to provide specific and legitimate reasons, supported by substantial  
25 evidence for not giving Dr. Pospisil's assessment significant weight. Accordingly, the  
26 ALJ erred in not affording Dr. Pospisil's assessment substantial evidentiary weight.  
27

## 28 V. CONCLUSION

1 For the forgoing reasons, the decision of the Commissioner is reversed, and the  
2 matter is remanded for further proceedings, pursuant to Sentence 4 of 42 U.S.C. § 405(g).

3 DATED: June 11, 2013  
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STEPHEN J. HILLMAN  
UNITED STATES MAGISTRATE JUDGE  
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